

## **INDEX.**

---

	<i>Page</i>
<b>Statement of Case.....</b>	<b>1-8</b>
<b>Rulings Below .....</b>	<b>8-9</b>
<b>Argument .....</b>	<b>10-13</b>
<b>The Evidence Conclusively Shows that Gilliland Developed the Vulcanizer in Issue Prior to the Date of its Alleged Invention by Adamson....</b>	<b>13-42</b>



# Supreme Court of the United States.

---

OCTOBER TERM, 1916.

---

No. 396.

---

CECIL F. ADAMSON, Petitioner,

vs.

DAVID C. GILLILAND, Respondent.

---

This case comes before this Honorable Court on a writ of certiorari, requested by the plaintiff, Cecil F. Adamson, and granted the 16th day of March, 1916, directed to the United States Circuit Court of Appeals for the Eighth Circuit.

## STATEMENT OF THE CASE.

This suit in equity was originally brought by Cecil F. Adamson, complainant, against David C. Gilliland and Amanda Gilliland, doing business under the name of Gilliland Auto Supply Company, at St. Louis, Mis-

souri. It appearing at the trial, however, that Amanda Gilliland was not connected with the business, the bill was dismissed by complainant as to said defendant and the trial proceeded against David C. Gilliland.

Defendant is charged with the infringement of complainant's patent No. 1,057,911, issued April 1, 1913, for a Portable Vulcanizing Device for Tires. The patent is found in the Transcript of Record at pages 19-24, and the device described therein is quite a simple one and the principle of its operation readily understood. The invention is intended especially for use in repairing punctured inner tubes of automobile tires, and, briefly stated, consists in a cup-shaped metal member or vulcanizer which is adapted to be clamped to a clamping plate, the tube to be vulcanized being held in place between the vulcanizer and the clamping plate during the process of vulcanizing. The work is vulcanized by simply burning a certain quantity of gasolene in the cup or vulcanizer, the rubber being vulcanized by the heat produced upon the bottom of the cup by the combustion of the gasolene.

The particular form of the patented device upon which the infringement charge is based is shown in figures 1 and 2 of the patent drawing opposite page 18 of the Transcript. The device is here shown with a number of posts extending upwardly from the bottom of the cup to about the level of the outer rim, and the claim is made by complainant that these posts perform the function of automatically regulating the temperature of the bottom or vulcanizing plate so as to prevent it from becoming overheated during the vulcanizing process. It is stated in the patent that the desired temperature at which the vulcanizing member

should be retained in order to effectively vulcanize rubber is substantially the same as the boiling point of the gasolene or like combustible fluid which is placed in the receptacle. It is thereupon claimed that in complainant's device the flame caused by the combustion of the gases rising from the gasolene acts directly upon the posts and heat is conducted by the posts down through the gasolene to the vulcanizing plate. As the temperature of the gasolene and vulcanizing plate rises, the rapidity with which the gas is given off increases, causing the flame to rise above the surface of the gasolene and above the top of the posts. When this occurs, the flame is rendered ineffective for the purpose of heating the posts or receptacle, and the temperature of the vulcanizing plate and the gasolene is gradually lowered until the flame again drops within the receptacle and becomes effective. The effect claimed is that the temperature of the gasolene and of the vulcanizing plate is thus automatically controlled so as to prevent them from becoming either over or underheated during the vulcanizing operation.

The defendant admits making and selling vulcanizing devices identical with figures 1 and 2 of the patent, and admits that said device as used by him is within the scope of the various claims of the patent. He claims, however, to have himself invented or produced the device prior to its alleged invention by complainant, and this question of priority constitutes the principal question in the case.

The complainant testifies that he is thirty-two years of age and resides at East Palestine, Ohio, and engaged in business under the name of Adamson Manufacturing Company. He is a consulting engineer by

4

profession, and during 1911 was superintendent of the factory of the McGraw Tire & Rubber Company at East Palestine, where he spent the major portion of his time, but also operated an office at Akron, Ohio, as a consulting engineer. Mr. McCormish, a witness for complainant, was associated with him in his engineering office. Complainant testifies that his attention was directed to the production of a cheap and simple vulcanizer during the summer of 1911 and that he first described his idea to Mr. McCormish at East Palestine and instructed him to go back to Akron and have some patterns made or turn out an experimental device. He made a sketch for Mr. McCormish, which is marked "Complainant's Exhibit 5." (Transcript, opposite p. 30.) His first sketch is signed by complainant and dated August 19, 1911, and is witnessed by Mr. McCormish and two other witnesses. It does not show the device with the pins or posts shown in the patent, but it shows in figures 2 and 3 two concentric rings inside of the cup, and it was in this form that the first experimental device is claimed to have been made. Mr. McCormish said he would have the device made but did not send it, and finally, on Labor Day, 1911, Mr. Adamson says he went to Akron and took the drawing back and had it made at the machine shop at East Palestine the next day. This original device was put in evidence as "Complainant's Exhibit 6."

The device was first made with the two concentric rings in the cup, but as the result of the combustion was not satisfactory, complainant said that in order to let in more air he had the rings turned out and the pins put in. This occurred, he testified, within the next few days after Labor Day, 1911. On October 6th, he made a sketch of the vulcanizer showing the pins

(Complainant's Exhibit No. 8, Transcript, opposite p. 34), and a sketch of the clamping plate to be used in connection with it, and from these sketches the working drawings were made, and patterns were made about the twelfth or fifteenth of October, 1911 (Transcript, p. 35). He first began to sell the vulcanizer about the latter part of October and all through November and from then on. Complainant estimated that two or three thousand had been sold by December 1st. A salesman was put on the road on December 1st, who started and went east toward Buffalo and Rochester and on through to New York. Since that time, complainant had sold in the neighborhood of 450,000.

In addition to complainant's oral testimony, his counsel (page 24 of the Transcript) stated to the court "that this patent has recently been adjudicated in the United States District Court for the Eastern District of Wisconsin, Judge Geiger rendering an opinion from the bench after full trial and proofs." He thereupon offered in evidence a certified copy of Judge Geiger's decree, entered December 17, 1913, which was objected to by defendant's counsel as incompetent, irrelevant and immaterial to any of the issues in this case, and because the defendant here was not a party to that suit and is not bound by it. The Court allowed the evidence to be put in and the defendant duly excepted. The decree in question, entered in the case of Cecil F. Adamson, complainant, versus Clarence A. Shaler *et al.*, appears at pages 24-25 of the Transcript. Mr. Hills stated that he expected to prove that Mr. Gilliland participated in the defense in the Shaler case and gave testimony therein, on which ground he claimed the decree was particularly material. He then offered in evidence a certified copy of the opinion rendered by

Judge Geiger (Transcript, pp. 26-28), and defendant's counsel offered the same objection and saved the same exception to the opinion as to the decree. The importance of this exception appears from the fact that when he came to render his own judgment in the case, his Honor, Judge Dyer, announced that he considered himself bound by the decision of Judge Geiger in the Shaler suit and it was upon the principle of following Judge Geiger's decision that the decree against Gilliland was entered (Transcript, p. 100), although his Honor intimated that he did not believe that the additional evidence in this case would have changed Judge Geiger's opinion had it been produced before him.

One other fact in the complainant's case deserves notice. Complainant, in his direct examination, testified that while his application was pending in the Patent Office he was brought into interference with a number of other claimants and that the interference proceedings finally narrowed down to an issue between Adamson and William R. Major, also of East Palestine, Ohio. Judgment was rendered on September 24, 1912, on this interference, in favor of Adamson, and upon this decision the patent to Adamson was issued. On cross-examination, Mr. Adamson admitted that it was the McGraw Rubber Company, the concern at East Palestine for which he was superintendent, which was the party in interest in the Major application, and that it was only by the payment of the sum of \$20,000.00 by Adamson that these parties were induced to withdraw and allow the patent to be issued to him. (Transcript, pp. 36-38.)

Only an outline of the defendant's testimony will be given in this place, a fuller discussion of the defendant's evidence being reserved for the argument.

Mr. Gilliland testified that he first produced vulcanizers corresponding to Figures 1 and 2 of the patent to Adamson in the first week of August, 1911. This was, of course, prior to the time of Adamson, who, as above seen claims to have first produced this form of vulcanizer the latter part of October (Transcript, p. 35). Mr. Gilliland, during 1911, was in partnership with another man on Olive street, St. Louis, under the name of "Auto Clearing House." In this business, he was handling, among other things, vulcanizing patches for automobile tubes, and it was in connection with the selling of these vulcanizing patches that the idea of the present vulcanizer was developed. He had occasion to sell some of the patches to a man named Huber, and in order to show him how they could be easily vulcanized, he went to a hardware store on Vandeventer avenue and bought a small ladle and a screw clamp, took them to the store on Olive street, and with this outfit demonstrated to Huber the process of vulcanizing patches. This was done by simply putting the patch on the tube and then putting the ladle on top of them, clamping them to the bottom of the ladle with a screw clamp. Gasolene was then poured in and ignited, and in about ten or fifteen minutes, when the gasolene was burned out, the patch was vulcanized. (Transcript, p. 75.) Huber asked why they could not sell the vulcanizers to the people that were using the patches. To this, Gilliland said, "Why, anyone can go to a hardware store and buy a ladle and clamp," and Huber then suggested putting it in "salable condition" by taking the ladle and putting some ears on the side and some pins in the center. (Transcript, p. 76.) This led to Gilliland making a wooden pattern, which he took to Mr. Kilpatrick's foundry in

South St. Louis, known as the South St. Louis Foundry, and the first castings or vulcanizers were made for Gilliland at this foundry on the sixth or seventh of August, 1911. Defendant testified definitely that it was on the seventh of August that he got his first castings. (Transcript, p. 76.)

This testimony as to the making of these castings for Gilliland during the first week of August was corroborated by a number of witnesses connected with the foundry at that time. These witnesses were Mr. Kilpatrick, secretary and manager of the foundry; Mr. Wurley, the time keeper; Mr. Shanks, general foreman and the man who himself made the original castings; besides whom were William Waldecker, Charles Haase, John Mirgain, Max Stevens, Jacob Dillman, August Schaefer and Henry Laundman, all employees of the foundry at the time. Several other witnesses who were not connected with the foundry were also introduced to corroborate Mr. Gilliland's testimony, but as the judgment in this case turned principally upon the testimony of the witnesses for defendant, a close analysis of this testimony is reserved for the argument.

#### **RULINGS BELOW.**

All of the testimony on behalf of the defendant in this case was presented orally in open court before the United States District Judge for the Eastern District of Missouri, who upon January 25, 1914, rendered an oral opinion from the bench, holding that the complainant was entitled to recover, and directing that a decree be entered in accordance with the prayer of the bill (Transcript, p. 100).

9

From this decision of the trial court, an appeal was duly taken by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit, and on October 11, 1915, an opinion was handed down by said Court reversing the ruling of the trial judge, and directing that the bill be dismissed. From this ruling, the matter comes before this Honorable Court on writ of certiorari.

**ARGUMENT.**

The crucial question in this case is a question of fact. The whole issue turns upon the question whether Gilliland produced the vulcanizer in question prior to Adamson. Taking the testimony of Adamson at its face value, he does not claim to have actually produced the vulcanizer until the latter part of October, 1911, nor to have placed it on the market until about the first of November, 1911, at which time he began making sales in Ohio, and somewhat later through the East. The testimony of Gilliland and his witnesses shows that he was in possession of the idea prior to August, 1911, and that he had some vulcanizers made at the South St. Louis Foundry during the first week of August. Gilliland produced full proof of the facts set up by him before the trial court, but before either he or his witnesses had been given an opportunity to be heard, he was faced with the decree rendered in favor of Adamson by Judge Geiger in the case against Shaler in Wisconsin. This decree and the accompanying opinion were not introduced merely for the purpose of showing an adjudication of the complainant's patent in another court against other parties, but complainant's counsel stated that it was his contention that the decree and opinion were particularly material in the present case because he claimed that Gilliland had participated actively in the defense of the Shaler suit and had given testimony therein. (Transcript, p. 26.) The Court went even further than this, and in his opinion (Transcript, p. 100) expressly based his decision upon what he conceived to be his "duty as a judge to follow the decision of the Court in the first

instance." It is true that additional testimony was introduced in this case, which was not before Judge Geiger, but even this additional testimony is mentioned in the opinion not as matter calling for the direct judgment of the Court in this case, but merely as matter of speculation as to whether it would have changed the opinion of Judge Geiger had it been placed before him in the Shaler suit. The entire opinion of the District Court is plainly based upon the judgment of Judge Geiger and not the independent judgment of the District Court itself. At the outset, the opinion says:

"In this case that was before a Judge of the United States Court of Milwaukee it is claimed here that Mr. Gilliland was a witness; that his deposition was taken and that he was examined orally in court.

"All of his claim as to when this work was done by him was before Judge Geiger. Judge Geiger has decided the case not only upon the testimony given before him, but with the depositions of Mr. Gilliland and Mr. Huber before him."

After a little further discussion, the opinion concludes:

"My opinion, therefore, is that following the rule that has been long adopted and followed in the various courts in this country, where a claimant of a particular device is examined before this Court, it becomes my duty as a Judge to follow the decision of the Court in the first instance. Believing that it is my duty to follow the decision of Judge Geiger, and knowing, as the record shows, that both Mr. Gilliland and Mr. Huber were examined as witnesses before that Court, either orally or by deposition, I cannot say that this testimony now introduced here would have changed

Judge Geiger's opinion at all." (Transcript, p. 100.)

It is respectfully submitted that the above opinion shoots wide of the mark. The question to be determined in this cause between Cecil F. Adamson, complainant, and David C. Gilliland, defendant, is not what was Judge Geiger's decision in the case between Adamson and Shaler, and still less is it in issue as to what Judge Geiger would have decided had he had the benefit of the testimony of the numerous witnesses who testified for Gilliland who had no part in the Shaler case. Gilliland is entitled to his day in court, and this he did not have in the Wisconsin proceeding. In the Shaler case he was neither a nominal party nor a party in interest, nor was he represented by counsel, nor did he contribute in any way to the defense of the case other than that he was called as a witness for Shaler and gave his testimony, which, in the opinion of Judge Geiger, was insufficiently corroborated. The learned Judge noticed the want of corroborative evidence to support Mr. Gilliland's testimony in that case, in the following words:

"That between the date which he gives, July 25th, and August 2nd, he should perfect this and ask that his statement be accepted without any corroboration whatever in the way that these statements are usually corroborated, by the production of drawings, models and more detailed description of the failures which all men must have in the development of an idea, cannot and should not be accepted to the exclusion of a reasonable doubt as against the story given by the complainant here. That I am unwilling to do, and I find against the defendant upon that ground." (Transcript, p. 28.)

Such being the ruling of Judge Geiger, which we are not disposed to criticize, when Mr. Gilliland now comes into court in his own case with an abundance of the corroboration which was wanting in the Shaler case, he is met with the ruling that his defense has already been passed upon by the judge who passed upon the Shaler evidence. The injustice of thus foreclosing Gilliland by the application of some rule which is supposed to have "been long adopted and followed in the various courts in this country" and which is assumed to require a court in such cases "to follow the decision of the judge in the first instance," would seem to be so palpable as to require no further argument. We confidently believe that this Court will hold that the defendant is entitled to a careful and painstaking consideration of the evidence which he produces in his own case and that the Court in passing upon the issues here presented is in no way concluded by the opinion of Judge Geiger.

**The Evidence Conclusively Shows That Gilliland Developed the Vulcanizer in Issue Prior to the Date of Its Alleged Invention by Adamson.**

Let us examine now the evidence for Gilliland. **Mr. Gilliland** for himself testified that he had formerly been engaged in the bicycle business in Indianapolis and that the principle used in the vulcanizer in suit was well known at that time and was used by him and others in Indianapolis in vulcanizing bicycle tires. (Transcript, p. 75.) The ladle, Defendant's Exhibit 2, is the original ladle that was used by him fifteen years ago at Indianapolis and was left in his father's tool box when he and his brother closed up their bicycle business there in 1897. (Transcript, p. 80.) This ladle was used by cleaning off the tube or casing that

needed to be repaired, putting it on the work bench or a block of wood, putting on the tire some raw cement, or vulcanizing cement, and raw rubber, then clamping the ladle down on the tube or casing with an ordinary clamp, and pouring in the gasolene and igniting it. Defendant's Exhibit 8 represents the kind of clamp used and is known as a "C-clamp" or an ordinary cabinet maker's clamp. The clamp is tightened or loosened on the work by turning the screw. In the vulcanizing operation, the screw extends all the way to the bottom of the ladle. (Transcript, p. 81.) We have here the main principle utilized in the vulcanizer in suit, and in this connection, it is to be noted that even Judge Geiger stated that he did not "think there is any doubt but that prior to the appearance of Mr. Adamson on the field of exploration the idea was known that a vulcanizing process could be carried on through the use of a gasolene liquid inclosed in structures similar to those which have been exhibited here, the Inman structure and the Gilliland ladle \* \* \*." (Transcript, p. 26.) The invention, therefore, if there is one here, is necessarily confined to such points of structural details as may be said to differentiate the so-called Adamson device from such pre-existing devices as the Gilliland ladle and clamp and others similar to it. These differences consist in only two points: The providing of the cup or receptacle with oppositely disposed ears for more convenient clamping; and the placing of the pins or posts inside of the cup with the result, as is claimed, of securing a more uniform regulation of the temperature of the bottom during the vulcanizing process. It seems to have been Judge Geiger's idea that Mr. Adamson, being a professional man, was better equipped to work out an invention of such a character than Mr. Gil-

liland, who was not a professional man. (Transcript, p. 27.) It is submitted, however, that when the real scope of the invention is considered, it is one which is not beyond the inventive capacity of an intelligent man who had for years been familiar with the practical work of vulcanizing tires of bicycles and automobiles. Certainly, there is nothing about the idea of providing the vulcanizer with ears in order that it might be clamped down, which requires anything more than ordinary, practical, mechanical intelligence. This leaves only the pins, and Mr. Gilliland gives an explanation of how he came to put them in the cup, which is at once natural and entirely consistent with the ability of a non-professional man. His explanation is that there was no secret about the use of the old ladle, but that anyone could go to a hardware store and buy a ladle of such a character and vulcanize with it. In order that there might be a better profit in the sale of the article, it would necessarily have to be modified in some way to put it into more "salable form." With this idea, besides putting on the lugs for clamping, the pins or posts were placed inside of the cup. Mr. Gilliland frankly admits that, as a matter of fact, the posts do not perform any different function in conducting the heat to the bottom than was formerly performed by the old C-clamp. There is, the defendant testified, in fact, no substantial difference between the actual results obtained in vulcanizing with the old ladle and with the vulcanizer in suit; both operate satisfactorily, and just as good a job of vulcanizing can be done with the ladle as with the vulcanizer. (Transcript, p. 81.) It thus readily appears that there is no necessity that a man should have a college education in order to put pins into this device, mainly as a selling proposition.

Mr. Gilliland's testimony is that having got the idea of the vulcanizer, he proceeded to make a pattern, and not having the necessary tools, he borrowed an extension bit from the Boehl Hardware Company. It was necessary to bore a three-inch hole in the wooden pattern and it was for this purpose that the extension bit was borrowed. Finally, when the pattern was complete, he went down to Kilpatrick's foundry (South St. Louis Foundry) and had them make some castings from the pattern. The castings were made about the sixth or seventh of August, and it was on the seventh of August that the defendant called for and obtained the castings which were good enough to deliver. (Transcript, p. 76.) After getting the castings from the foundry, defendant carried them over to the Southern Auto and Machinery Company, 116 Robert avenue, about a block and a half away from the Kilpatrick foundry, and asked Mr. Miller to haul them up to defendant's house. (Transcript, p. 76.) The castings were rough, full of sand, and some of the pins were broken out; but defendant picked out the best ones, and he and Mr. Miller hauled them up to defendant's house. Defendant smoothed off one of the castings with a file and tried it out the next morning and got a comparatively good job of vulcanizing, although the casting was a rough one. He took this vulcanizer up on Olive street to Mr. Huber, the man who had suggested to him putting in the pins, and showed it to him. (Transcript, p. 76.) After that defendant did not do much with the vulcanizer until September. (Transcript, p. 77.) During that month, he had occasion to ride with Mr. Huhle, an electrician, in Mr. Huhle's automobile, and had one of the vulcanizers in his hand at the time. Mr. Huhle was interested in it and said he would like to have it, as he had just bought

his car and had some tubes that needed repairing. Defendant said "uhle this vulcanizer for one dollar. (Transcript, p. 77.)

Defendant did nothing more at that time, with the exception of getting the witness Shephard, a machinist, to machine off two of the vulcanizers on the surface so that he could continue his experiments with them. These two were machined off by Shephard in the latter part of September. (Transcript, p. 77.) Plaintiff at this time was in such financial condition that he could not go ahead and have good patterns made. He had only drawn about \$350.00 for his year's work from March 15th to the latter part of September, and was badly in debt, so he was compelled to drop the vulcanizer until some time in December, when he took two of the vulcanizers to the Koochook Rubber Company, who told him to have some more made. A little later, in January, he went to the Liberty Foundry and had them make him up some of the vulcanizers, the first lot of which were, however, not received and paid for until February.

The corroboration of Gilliland's testimony is quite ample. It is particularly strong upon the crucial fact of the production of the first batch of vulcanizers at the South St. Louis Foundry in the beginning of August, 1911. This fact is established by the testimony of practically everyone connected with the foundry, namely, witnesses Kilpatrick, Wurley, Shanks, Waldecker, Haase, Mirgain, Stevens, Dillman, Schaefer, and Laundman. Nor are these ten witnesses unsupported by outside evidence, for there is an array of testimony of other witnesses not connected with the foundry.

Taking up first the witnesses connected with the

foundry: The first in order is **Frederick N. Kilpatrick** (Transcript, pp. 41-45). Mr. Kilpatrick testified that he has lived all his life in St. Louis and is secretary of the South St. Louis Foundry, with which he has been connected since 1886, and of which Mr. Gilliland had been foreman about five years before.

Witness was shown the rough vulcanizer castings, Defendant's Exhibits 10 and 15, and testified that he had seen castings similar to them at his foundry in 1911. He thereupon produced duplicate dray tickets, original and carbon copy, issued by him at date of the delivery of the castings to Gilliland, on the regular stationery of the foundry. This dray ticket is dated on August 7, 1911, and witness identified the following as in his own handwriting: the date, "8/7/11," the words, "Call for D. C. Gilliland," the words, "25 Vulcanizer Castings in exchange for 1 set American batteries & spark plugs. No charge," and the weight, "75#." All of the written portions of the ticket he identified as in his own handwriting with the exception of the signature, "D. C. Gilliland," at the bottom, which he testified he saw signed by Mr. Gilliland at his office on the date stated in the ticket, August 7, 1911, at the time of the delivery of the castings (Transcript, p. 41). Witness testified further that he could not say that he saw all the twenty-five castings mentioned in the dray ticket, but saw some of them; they were carried up to the front of the shop, about 300 feet, and were left outside of the office in front of the machine shop. They were left out there, and it was reported to him there were 25 castings and he made out the dray ticket in that way. (Transcript, p. 42.) Mr. Gilliland had offered him the batteries and spark plugs in exchange for the castings, and it was about

an even exchange, and witness let the transaction go in that way. There was no other charge, and a transaction of this nature would not occasion any entry in their books. The names of the employes of the foundry from time to time were kept in a fortnightly time book, in which a man's name was entered and from which his name would be dropped when he quit or was discharged. Among the persons present in the court room, witness identified as employes of the foundry at the time these castings were made, witnesses John Shanks, August Schaefer, Henry Laundman, Jacob Dillman, Charles Haase, William Waldecker, and Joseph Mirgain. (Transcript, p. 43.)

These vulcanizer castings were the only castings they made for Gilliland, as far as the witness could recollect. Independently of the dray ticket, the only way he had of fixing the date was from the batteries and spark plugs. Of these, he says:

"I wanted to use them for a boat at the time which I was trying to buy and did not buy until two or three months later—a motor boat for my own use throughout the summer season, summer and fall from April to December. I finally bought it about October or November of that year, 1911. The batteries and spark plugs were used on father's boat in the meantime. (Referring to the batteries and spark plugs mentioned in dray ticket, 'Defendant's Exhibit A.') I received them from David C. Gilliland. I got them when he got the castings." (Transcript, p. 43.)

Testifying independently of the dray ticket, which is dated, witness fixed his preliminary conversation with Mr. Gilliland concerning the castings about the latter part of July or the first week in August, and would judge the castings were made about the first

week in August. (Transcript, p. 43.) Mr. Kilpatrick gave Gilliland permission to have fifty castings made. He believed they made more than twenty-five, but lost some of them and refused to make any more of them because they could not make them successfully in their shop, as they cater only to heavy work. His clerk counted them and gave him the information from which he made out the dray slip. (Transcript, p. 45.)

Witness **John F. Shanks** testified he had lived in St. Louis for forty years and by occupation was a molder, and was general foreman at the South St. Louis Foundry. He had been there for the last five years and remembered the Gilliland job. The foundry was put up for heavy work, and this casting was what is called "light" casting work, and they had no sand required for that kind of work. Heavy casting requires a coarse sand, and this light casting requires a finer grade of sand. (Transcript, p. 45.) When the job came in, the witness, who was the foreman, thought it was a complicated job and thought it best to make them himself, which he did. Gilliland gave him the pattern. The rough castings lying on the table (Defendant's Exhibits 10 and 15) were made by the witness. He could not swear positively that he made those castings, but he made castings like them. The two rough castings do not differ in any particular from the castings he made. (Transcript, p. 46.) These castings are defective, as they ought to have nineteen pins in each, and some of the pins are broken out. Witness remembered having a pattern, which was brought to him by Gilliland, but could not remember whether it was a metal pattern or a wooden pattern. He poured them, or cast them, himself. Some of them were bad; the bad ones were not taken away by Gilli-

land. Witness could not give a date when the castings were made, but stated that it was before Labor Day, saying:

"It was before Labor Day, that is all I could tell you. We had them before Labor Day, 1911, because in the year before that we were working on big work, you might say, all the way through. Labor Day was the first Monday in September. It was three or four weeks, maybe a month before Labor Day." (Transcript, p. 46.)

Witness further states that Jacob Dillman, Joe Mirgain, Charley Haase, Schaefer, and Laundman (who were all present in the court room as witnesses for Mr. Gilliland) were working in the foundry at the time this work was done. These men had, however, nothing to do with the work. Schaefer was the man who took the castings down to the chipping bench, where they were brushed or cleaned up, and some were taken away without being cleaned. The other men had nothing to do with handling them at all; all they know is that the work was made there. (Transcript, p. 46.)

**William Waldecker** also testified that he had lived in St. Louis all his life. He was not employed but had been last employed by the Mississippi River Commission. In 1911, the only work he did was at the South St. Louis Foundry. Shanks, Haase, Mirgain, Walsh, Dillman, Stevens, Laundman, and Schaefer were employed there at the same time. It was either the latter part of June or the first part of July, 1911, when he started to work at the South St. Louis Foundry, and he quit in September. (Transcript, pp. 47-48.) During the time he was working there he saw there castings just like the Defendant's Exhibits 10 and 15. He saw around the shop, good and bad, between twenty

and thirty castings. (Transcript, p. 48.) This was at least a month or a month and a half before witness quit the foundry. (Transcript, p. 48.)

On cross-examination the witness said he saw the defective castings lying around the chipping bench about four days. The men used to make remarks about them during the dinner hour, seeing them lying around, and called them "waffle irons." There were at least half a dozen; some of them had the pins knocked out, and others had the lugs broken off; others, after being brushed, had a hollow space when cleaned out. Witness himself handled them, looking at them to see what caused them to be bad. (Transcript, p. 48.)

Witness **Charles Haase**, forty-two years of age, has lived in St. Louis all his life; is a molder, and has worked at the South St. Louis Foundry off and on for about twenty-eight years. It was the first part of August, 1911, when he left there. Before that, he had worked there six or seven months. A few months after that he came back. Speaking of the time when he was there before he quit in August, he did not see the castings, but he saw the pattern. If not mistaken, it was a wooden one. He saw it at the South St. Louis Foundry in August, 1911. Dave Gilliland had it. He had known Gilliland six or seven years or more; had worked for him at the South St. Louis Foundry when Gilliland was foreman there. Witness saw the foreman mold the castings but left before he saw any of the castings. He could not tell exactly when he left the place, whether it was the second or third of August. (Transcript, p. 50.) After leaving there, he went to Timmerman's, the St. Louis Corliss, where he was working at the time of the trial. During the time he

was at the South St. Louis Foundry, Mr. Wurley kept the time book. (Transcript, p. 49.)

On cross-examination, witness said he remembered seeing Gilliland bring in the pattern, and said his memory was very good, that this was in the first part of August, 1911. (Transcript, p. 50.)

Witness **John Mirgain** at the time of the trial was employed at the St. Louis Axle Company. Prior to that, he was employed at the South St. Louis Foundry for ten years. He stayed there until the middle of September, 1911, when he left. He remembered Haase, Shanks, Dillman, Laundman, Schaefer and Stevens being there at the same time. They were all there a month and a half before he quit. (Transcript, p. 51.) This witness also saw the vulcanizer castings made at the South St. Louis Foundry when he was there and said he saw them the latter part of July or the first week in August. He never saw the pattern. He did not see the making of the castings but saw the castings when they were laid out on the chipping bench when they were already cast and ready to be cleaned up. He saw twenty or thirty, more or less.

Witness **Max Stevens** was not employed at the time of the trial, but had been employed off and on at the South St. Louis Foundry as a core maker for about thirteen years. He also had seen castings down there similar to Defendant's Exhibits 10 and 15, but did not handle them. All he did was to handle patterns and put them away; he put all the patterns away after they were cast. When he first saw the wooden pattern down there, he knew it was in warm weather, but could not fix any date. It was about 1911, all right, he knew,

but he could not say whether June or July. He saw the pattern lying on Shank's floor and saw the castings after they were cast. He could not tell how many castings were made. There was a pile of them there, but he could not say how many. They were on the front end of the floor where they shake out and throw them in a pile ready to be taken away. The pattern was put away, and when it was looked for, it was broken up; there were some small pieces found of it, but what became of the pieces he could not say. (Transcript, p. 52.)

On cross-examination, the witness again said that it was in 1911 when he saw this wooden pattern at the foundry and that he knew that it was warm weather when he saw it. (Transcript, p. 53.)

**Jacob Dillman**, the next witness, was an iron molder at the South St. Louis Foundry and had been employed there off and on for about twenty years; was there during the year 1911. He also identified defendant's Exhibits 10 and 15 as being similar to castings he had seen at the foundry. He thought Shanks was the one that made them. He did not see him molding them, but saw him making the molds and saw the castings after they were made. This witness could not say what the time was. He could not even swear to the year, but guessed it was in the fall some time or some time in the latter part of the year. (Transcript, p. 53.)

**August Schaefer**, the next witness, was a laborer at the furnace at the South St. Louis Foundry and had been there eleven years. He also testified to having seen castings similar to Defendant's Exhibits 10 and 15 at the foundry. He could not remember the day or

the year. It was several years back, he knew. He remembered they were made, but could not tell when it was. He remembered that John Shanks made them. Witness did not work in the sand at all, but just labored around there. He does not work in the shop, but out in the yard, but he came and wheeled these castings down to the chipping bench himself. They were put in the wheelbarrow and he wheeled them down. He did not think there were over thirty or thirty-five, or probably forty. He never saw any more than just one lot of these castings. (Transcript, p. 54.)

**Henry Laundman** had worked at the South St. Louis Foundry about twelve years and had seen castings there similar to Defendant's Exhibits 10 and 15. He was not sure how many, but when he saw them they were lying on the bench. It must have been anyhow two or pretty near three years ago, according to witness' recollection. It was warm weather, and just the one lot was all he saw. (Transcript, p. 54.)

On cross-examination, witness said that he thought it was over two years and close to three years before the trial that he saw those castings on the bench. It was in 1911. It was warm weather and he runs the cupola and melts the iron. Being asked if he did not do this in cold weather also, he said, "Yes, but you don't sweat as much as in warm weather." (Transcript, pp. 54-56.)

**William C. Wurley**, the last witness from the foundry, was the time keeper at the foundry during the year 1911. He attended to most of the shipping and the time keeping, and produced his time book in court at the trial. In this book, they take the days of the

week because the cupola tender and the charger get an extra compensation for heating days; there is more labor attached to it. They enter the time ending fortnightly; the time for each man in both the machine shop and the foundry. They keep the names of all the men that are working. From examination of the time book, witness here testified that Shanks is in the book as foreman during the year 1911. Witness turned to a page in the book covering the two weeks from the first of August to the twelfth of August, 1911. (Transcript, p. 56.) With his time book before him, witness further testified:

"The names of all that were in the foundry during that fortnightly period are: John Shanks, Charles Haase, Joe Mirgain, Jake Dillman, Henry Laundman, Max Stevens, John Brown (he was the driver), August Schaefer, William Waldecker, John Grady, Ed Heckstein, Fred Walsh and John Chew; the last mentioned is an apprentice. Shanks was the foundry foreman. Haase was a molder; Mirgain a molder; Waldecker a molder; Stevens a coremaker; Dillman a molder; Laundman, cupola tender; Schaefer, cupola charger. That leaves John Grady and Ed Heckstein; those two were both helpers. They are not in our employ now. They are both out of the city, I think.

"Shanks had not missed a day since he had been there. He started to work for us the last time on the 27th of September, 1909. He had been working for us off and on, but he left us a few months before that and came back shortly after.

"Haase started in on January 31, 1910, and worked up to August 4, 1911; that is the date of his last employment, and our book shows here that we only heat on the third, it being the day before he quit; run heat the day before he quit, as shown by a little check mark above the number of hours. That is shown by our time book.

"During 1912 Haase started in on April 21 and he worked the 21st and was off all week until the last four days of the two weeks; then he seems to have worked steady for a few days only and stopped again; he worked five hours and that ended his time on the second of June, 1913.

"After he quit on August 4th, 1911, his first employment begun on the 22d of September, 1912. September 14, 1911, was the last day both Mirgain and Waldecker worked there. The two quit the same day. Business got slack on that day and they laid them off on the 14th of September, 1911. They never worked there since.

"The time book shows that we had heat at the foundry on Thursday, the 3d of August. The 10th of August we had the first heat after, and the 29th of July the first heat before." (Transcript, pp. 56-57.)

This witness also remembered seeing castings similar to defendant's Exhibits 10 and 15, at the foundry. Exhibit 10 he remembered particularly from the way it was planed. (Transcript, p. 57). Witness did not count the castings. He counted twenty-five, between him and the helper, to give to Mr. Gilliland. It was witness' first year at the foundry and he knew that it was during warm weather. They have a board over the cupola platform, but they usually take that down in summer on account of the intense heat. In winter they close that up. Witness knew this was done in the time they made them in front of the cupola. He remembered that independently of his records; also, it was his first year at the foundry. He started on September 13, 1910, and was not there quite a year. (Transcript, p. 57.) Mr. Wurley saw the two dray tickets, defendant's Exhibits A and B, made out. He was there when Mr. Gilliland signed the tickets and saw them

signed. As to the delivery of the castings, witness testified:

'We brought the castings in from the foundry and I don't believe we weighed them. We did not weigh the castings. Mr. Kilpatrick, I think, estimated the weight on it as seventy-five pounds. We brought them up through the machine shop; the foundry leads right into the machine shop, and the office is north of the machine shop. We set the castings right outside of the office door and Mr. Gilliland took them. Mr. Gilliland was in the office while Mr. Kilpatrick was making out the ticket and I brought the number of castings in to them. I, myself, furnished the number, twenty-five to Mr. Kilpatrick. There was only one lot that I could remember of that same pattern. The dray ticket had been in my custody all of this time, but Mr. Kilpatrick had access to the files. I produced it the day they took my deposition; I couldn't say what date it was. I saw the date '8/7' written on there at the time.' (Transcript, pp. 57-58.)

This witness also testified that he knew at the time the castings were delivered of the exchange for the patterns, because he wired the boat up himself. It was the old gentleman's boat, Mr. R. J. Kilpatrick's. Witness did some electrical wiring on this boat and also fixed the ignition of the engine, and thought it was with this material that they got from Mr. Gilliland, but was not sure of it; he used it later on for Mr. Kilpatrick's small launch. He got that the latter part of 1911. Some of this material that he got from Gilliland, witness used on that boat, and before that he used it on the "Bessie K.," Mr. R. J. Kilpatrick's boat. Witness took it from the one to the other. (Transcript, p. 62.)

**Herman Miller**, manager and treasurer of the Southern Auto & Machinery Company, was the next witness for defendant. This witness was shown a paper on the stationery of the Southern Auto & Machinery Company, dated St. Louis, Mo., 8/8/11, and concerning it said:

"That is just one of our dray tickets ordinarily used when delivering goods. This recalls the time when I loaned Mr. Gilliland a pipe vise and a pipe cutter. The ticket is made out in my own handwriting; the signature is Mr. Gilliland's. I remember the transaction, the date was August 8, 1911. I fixed the date from the ticket itself being made out on that date. Mr. Gilliland on the 7th came over with two sacks of castings and asked me if I would at the same time loan him a pipe vise and a pipe cutter inasmuch as we had pipe tools there on account of our water system work, and he had some pipe work to do at his home. I willingly said I would, and he asked me if I would mind hauling those next day, the two sacks, at the same time, inasmuch as the pipe vise was heavy. I consented to do that, but I told him I couldn't do it on the 7th, and on the following day he came back, because I did not know at that time where Beethoven Street was, and delivered the tools and the two sacks of castings. It was apparently on the 7th Mr. Gilliland came to our place of business, the day previous to the day I took them out. It was around noon time, some time; I made the trip up at noon to get my dinner at the same time, if I recall correctly. He told me he brought them from the Kilpatrick foundry. They were lying on the floor by our garage, the front part of our building. He brought them into our garage; they were in two sacks. On the 8th he threw them in the car and we rode up to his house and took them out. It was an Ohio touring car, an automobile. No one else was in the car besides

Mr. Gilliland and myself. Our place of business was at 116 Robert Avenue. It is about three blocks from the South St. Louis Foundry. I got a glimpse of the castings. I judge this to be one; it was similar to that (indicating defendant's Exhibit 10). I was somewhat inquisitive about it, and asked Mr. Gilliland what he had in the bag and asked him if it was junk. He lifted one out and said, 'You might think it is junk, but it won't be junk before long.' That is about the gist of the conversation. Nothing further passed as far as this is concerned." (Transcript, p. 68.)

The dray ticket covering the pipe vise and pipe cutter transaction, which was dated August 8, 1911, was put in evidence (Transcript, p. 69), and witness identified the written portions as being in his handwriting, with the exception of Gilliland's signature. The dates on the dray ticket show that the pipe vise and pipe cutter were loaned to Gilliland on August 8, 1911, and were returned by him on October 12th following. It was on the first-mentioned date, August 8, 1911, that the tools and the two sacks of castings were carried over to Mr. Gilliland's home on Beethoven street in witness' automobile. (Transcript, p. 68.)

**Clarence L. Shephard** is the next witness for defendant. Witness is a mechanic, having an auto repair shop of his own known as the C. L. Shephard Machine and Auto Repairing Company, at 3613 Gravois avenue, St. Louis. In 1911 he was in the employ of the Franklin Auto Company, of Syracuse, N. Y. They had at that time an office at 1306 Olive street, where witness was working. Witness personally did some work for Mr. Gilliland in turning the bottoms off of some castings he had. It was a casting like Defendant's Exhibit 10, similar in all respects. Witness paid

no particular attention to the castings, but just turned off the bottoms and smoothed them up for him. There were two of them given him by Mr. Gilliland to turn the bottoms off and find out the approximate cost of getting them done by the thousand. This was somewhere between the middle of August and just before the V. P. Ball, which was about the sixth of October. On cross-examination witness testified that he knew it was before the V. P. (Veiled Prophet) ball, because after the V. P. ball he knew they got very busy in the shop and before that they were very dull. They had nothing to do there practically for two months in the shop, but would not have time to do the work after that. This work had no connection with the company; it was done for himself, personally, and took five or ten minutes, along in there somewhere. (Transcript, p. 70.)

**Max Huhle**, an electric contractor, testified that in August, 1911, he bought a second-hand automobile and found himself in need of something with which to vulcanize his tires, which were giving him trouble, and that about the middle of September he bought one of these vulcanizers from Mr. Gilliland, and vulcanized with it in accordance with Gilliland's directions. He used it with a wooden block, screwing the casting to the wooden block, with the rubber tire between. The first couple of times he used it he put in too much gasoline, but afterwards found out just how much gasoline to use. He was driving Gilliland in his automobile at the time he bought the vulcanizer, and Gilliland had the vulcanizer in his hand. He asked Gilliland what it was, and when Gilliland explained what it was and how it was used he bought it from Gilliland for a dollar. (Transcript, pp. 71-74.) This witness testified

positively that it could not have been as late as October that he bought this vulcanizer from Gilliland. (Transcript, pp. 73-74.)

**Harry Spoeneman**, brother-in-law of Gilliland, corroborated Gilliland both as to the wooden pattern and the iron castings. Mr. Spoeneman was at the time employed by the Boehl Hardware Company and quit his employment there the third of July, 1911. While he was there, Mr. Gilliland got him to borrow from the hardware company a three-inch bit used to bore a hole three inches in diameter in wood. He saw the piece of wood Mr. Gilliland had bored with it. Mr. Gilliland had a tool bench in the basement where he did his work, and Mr. Spoeneman picked up there the wooden piece which he had bored with the extension bit. At the time he saw it it was painted black. It was a round piece with a hole three inches in diameter and had a lug on each side and was painted black. The casting, Exhibit 10, was identified as being on the order of the wooden piece that he saw in Gilliland's basement. It was about eight or ten days before he quit the Boehl Hardware Company on July 3d that he got this bit, and it was the latter part of July when he saw the wooden piece (or pattern). After that, during August of the same year, he saw castings around Mr. Gilliland's place on the order of the rough casting, Defendant's Exhibit 10. He saw five or six of these castings around the tool bench in the basement. He fixed the date when he saw the castings as in August, because he left there the latter part of August and went to Joplin, Mo., and did not come back to St. Louis until the following summer, 1912. At the time he saw the wooden piece (or pattern) it did not have any pins

inside of the cup, but the castings he saw had pins in them. (Transcript, p. 98.)

The borrowing from the Boehl Hardware Company of this extension bit at the time testified to by Gilliland and Spoeneman was further corroborated by Mr. William J. Baier, who was employed by the Boehl Hardware Company at that time. Mr. Baier testified that he could not fix the exact date of the loan of the bit, but knew that Mr. Spoeneman worked for them about three months and quit on the third of July, so he knew it was shortly before that date. Mr. Spoeneman never worked for them after the third of July, 1911. (Transcript, p. 98.)

Ruth Gilliland, defendant's daughter, nine years old, also testified to seeing castings like Defendant's Exhibit 10 in the basement. She remembered her father making the wooden pattern and remembered his using the lathe in making it. She further testified that the pins in the wooden pattern were made by Mr. Gilliland from pieces taken out of the back of a little doll's chair which belonged to her, and that it was during her summer vacation. (Transcript, pp. 98-99.)

As to Huber, who was the party who originally suggested to Gilliland the idea of putting pins in the vulcanizer, the record shows (Transcript, p. 18) that at the opening of the trial counsel for Gililand announced to the Court that they had been trying to get Huber as a witness, but that in some way or other the marshal had not succeeded in serving him, and asked the Court to direct the marshal to make a special effort to get him into court, stating that he lives and has his place of business at 3150 Locust street, and was evi-

dently evading service. Counsel for complainant also stated that they had made three trips out there and could not locate Huber. Although the trial lasted four days, the marshal did not succeed in bringing this witness into court, and at the close of the testimony, Mr. Holcombe, of counsel for defendant, testified to efforts he had made to get Huber as a witness; that he had a subpoena issued for Huber, and that one or two days later he, himself, saw Huber at his place of business and talked with him. Huber told him that he had not been served with the subpoena and that he did not want to testify. Thereupon, defendant's counsel made a formal tender of the deposition given by Huber in the Shaler case, but this deposition was objected to by counsel for complainant, and the testimony of Huber is accordingly not available.

It is submitted that the defendant's evidence above outlined ought not to be disposed of with the remark that it would serve no good purpose to discuss it. It is submitted that the defendant's evidence is entitled to exactly the same respect and consideration in this cause as if Judge Geiger had never decided the Shaler case, and just as much as if Mr. Gilliland had not been an uncorroborated witness in the Wisconsin case. If the testimony of Gilliland be true, the judgment on the present record must be in his favor; if the testimony of his witnesses be true, the judgment must be in his favor; and if the documentary proof be not faked outright, then again, the judgment must be for defendant. It is not at all necessary that Gilliland's testimony be received, unless we deliberately throw out the testimony of all of his witnesses, and it is scarcely necessary that we rely upon the veracity of either himself or his witnesses if the documentary evidence be received.

Probably the most important single fact is the making of the twenty-five or thirty castings, or vulcanizers, the first week of August, 1911, at the South St. Louis Foundry. In view of the intimation of Judge Geiger that Gilliland's testimony ought not to be accepted as sufficient without corroboration, we have in this case brought in every one who was connected with the South St. Louis Foundry at the time of this transaction, who could be found in the city of St. Louis and reached by a subpoena. All of the possible witnesses on this question have been exhausted. Every man who could give any testimony has been brought into court. One or two of the laborers or molders had no special means of fixing the time other perhaps than by its being prior to Labor Day or by its being during the warm weather when the cupola was open and when the work at the foundry was very hot, but again we have witnesses who testified to seeing these castings, and who were not employed there, as the time book proves, at a later date. Even the testimony that it was during warm weather is not to be regarded as worthless, for we have on all hands the testimony that the only castings that were ever made at the South St. Louis Foundry were the original rough castings which represented Gilliland's first attempt to produce the vulcanizer in accordance with his wooden pattern. These turned out to be so rough and defective that it was necessary for him to have the vulcanizers subsequently made at the Liberty Foundry, which was better equipped for light work. It is not denied by complainant that these castings were made at the Liberty Foundry in February, 1912. This fact, at least, stands admitted upon the record. (Transcript, p. 97.) Further, there can be no question about the rougher cast-

ings having been made at the South St. Louis Foundry at an earlier time, as it was one of these rough castings, smoothed up for the purpose, that he first brought to the Liberty Foundry about the middle of January, 1912, to be used as a pattern, as Mr. Mellow testifies. (Transcript, p. 96.)

Mr. Gilliland explained his going to the South St. Louis Foundry for his first castings and his delay of several months in afterwards going to the Liberty Foundry by his financial condition at the time. By reason of this fact, he was handicapped at every turn, and the same measure of diligence is not to be expected in such matters from a man who is without funds as from a man who is more fortunately circumstanced. Mr. Gilliland had been, five years before, the foreman at the South St. Louis Foundry, and had met there with a severe accident and Mr. Kilpatrick testified that he felt that Gilliland was entitled to any reasonable consideration in the way of making small castings for him without charge. Although, therefore the character of the foundry and the sand used there were not suited to this kind of light work, it was the best that Mr. Gilliland was able to do under the circumstances. That Gilliland was practically without funds throughout the entire period in question is shown by the evidence of all of his witnesses. When he wanted the first castings made he was compelled to go to a foundry specializing in heavy work, solely because it was the only foundry in St. Louis where he could get a small job done in the way of a pure accommodation. The work speaks for itself, the castings being very inferior, although sufficient to fully demonstrate that the idea was a practical one. When the castings were ready for delivery, he again was compelled to ask a friend to

carry them to his home in his automobile. After this, he found it necessary to get another friend to machine off the bottom of a couple of the castings during his off hours, which again was done as an accommodation and without pay. Prior to having this first batch of castings made, he had had to borrow the extension bit from the Boehl Hardware Company, where his brother-in-law, Spoeneman, was employed, in order to bore the three-inch hole in making the pattern, and to make the pattern himself with his lathe in his basement. None of these things are at all extraordinary in the case of the average inventor. They point to a financial condition which is not at all unusual in such cases. On the other hand, such a handicap necessarily creates delays which do not occur when a man is amply provided with funds and all the means of rapid development of his idea are at his command. Mr. Adamson, indeed, with the assistance of Mr. McCormish and his draftsmen and pattern makers, and all the facilities at his disposal, could proceed more rapidly. But even after Gilliland had procured his first batch of some twenty-five or thirty vulcanizers and had found the device to be practical, he was not in a position to have them made in quantities at a foundry suitable to turn out the work in a merchantable condition. Accordingly, Mr. Mellow, of the Liberty Foundry, testifies that even in January, 1912, when Gilliland first came to him about this work, he was still in such circumstances as not to be able to pay the money to get the work done promptly. "We experimented with this pattern several days, a couple of weeks," says Mr. Mellow, "and waiting for Mr. Gilliland to come down and pay us a cash deposit because he had no established credit in St. Louis, or any other means so we could collect if we

should make castings for him in large quantities." (Transcript, p. 96.) In this way, it took about six weeks longer to obtain a delivery of the first castings. Mr. Mellow says: "The first record we have of Mr. Gilliland receiving any castings and paying for them was February 27, 1912."

An analysis of the above record shows that the corroboration of Gilliland upon each important fact is complete, and herein lies the radical difference between the present record and the practically uncorroborated testimony he gave in the Shaler case.

The several facts going to make up Gilliland's defense are as follows:

1. The making of the wooden pattern in July of 1911. This fact is testified to by Mr. Gilliland and directly corroborated by Mr. Spoeneman, his brother-in-law, and Ruth Gilliland, his daughter, both of whom saw the pattern in his basement, where he had his work bench. Spoeneman also testified to having borrowed from the Boehl Hardware Company for Gilliland the three-inch extension bit with which the three-inch hole was bored in the wooden pattern. This loan of the bit is corroborated by Mr. Baier, of the Boehl Hardware Company, who testified that it was borrowed by Spoeneman while working there a couple of days before he quit on the third of July, and was returned within a couple of weeks. (Transcript, p. 97). This wooden pattern was used by Shanks at the South St. Louis Foundry in making the castings there, as testified by him (Transcript, p. 46), and was also remembered by Haase (Transcript, p. 48), and Stevens (Transcript, p. 52.)

2. The making of the twenty-five or thirty castings

at the South St. Louis Foundry in the first week of August, 1911. For this fact, we have the direct evidence of Gilliland, supported by:

- (a) Kilpatrick, manager of the foundry, and Wurley, shipping clerk and timekeeper, who testified to delivering the castings to Gilliland on August 7, 1911. (Transcript, pp. 43 and 57.)
- (b) The original dray ticket made out at the time by Kilpatrick, and signed by Gilliland in the presence of Wurley, dated in Kilpatrick's handwriting "8/7/11." (Transcript, p. 42.)
- (c) The testimony of Shanks, the foreman, and Waldecker, Haase, Mirgain, Stevens, Dillman, Schaefer and Laundman, molders and laborers at the foundry, who testified the castings were made during the summer of 1911, while it was warm weather, and several of them fixing the date during the first week in August.
- (d) The foundry time book, which shows that the witnesses produced were practically all of the men employed at the foundry during the first part of August, 1911, excepting two helpers who were not in the city at the time of the trial. (Transcript, p. 56.) The time book shows that Shanks was foreman during 1911; that Haase quit the foundry on August 4, 1911, and did not work at the foundry again until the 22d of September, 1912. (This witness testified that just before he left he saw Shanks working on the molds, but did not see the castings made and never saw the castings.) Both Mirgain and Waldecker worked there during August, but quit on September 14, 1911, when they were laid off and have never worked at the foundry since. (These two men testified that the castings

were made about a month and a half before they quit.) (Transcript, p. 56.)

(e) The date of delivery of these castings was further corroborated by the testimony of Miller, manager and treasurer of the Southern Auto & Machinery Company, who carried the castings in his automobile to Gilliland's home on August 8, 1911; and Mr. Miller's dray ticket, dated 8/8/11, covering the delivery to Gilliland of a pipe vise and pipe cutter, which were delivered at the same time with the castings. (Transcript, p. 68.)

3. The corroborative testimony of C. L. Shephard, a mechanic, who machined off the bottoms of two of the rough castings for Gilliland at the shop where he was employed, between the middle of August and the first part of October, 1911. (Transcript, p. 70.)

4. The testimony of Huhle, who bought one of the vulcanizers from Gilliland during September, 1911. (Transcript, p. 71.)

All of the above testimony relates to transactions prior to Adamson's alleged invention or production of this vulcanizer; and if any part of the above evidence is true, Adamson is not entitled to the decree in this suit. When the fullness of this corroboration is considered and the fact is taken into consideration that Gilliland cannot be foreclosed here without rejecting the entire array of his witnesses and throwing out all of his proofs, it is hardly believed that any further argument is necessary. It is indeed seldom that a Court finds itself compelled to adopt such drastic means to support a decree.

So far, we have spoken of Gilliland and his wit-

nesses. It is submitted that they are entitled to credit and that their testimony is decisive of the case. Nor can we understand by what process of reasoning suspicion is to be cast upon all of these men without doing so upon the sole principle, announced by the District Court, of considering ourselves bound at the very outset "to follow the decision of the Court in the first instance." If, of course, we must follow Judge Geiger, no possible amount of evidence can avail; on the other hand, if the evidence is to be examined at all, we respectfully contend that the evidence set out in this record is beyond dispute.

On the other hand, we cannot refrain from suggesting that there is at least some ground upon the face of the complainant's own case, for suspecting his evidence. Mr. Adamson testified that he was the superintendent of the McGraw Tire & Rubber Company, of East Palestine, Ohio; and although there is no hint in his testimony of any meritorious claim whatever on the part of Major or of the McGraw company, he admitted on cross-examination that he paid the sum of \$20,000 in order to get rid of the interference proceeding filed by Major and backed by the McGraw Tire & Rubber Company, and it was in this manner that Adamson obtained his patent. This, he admits in his own cross-examination. (Transcript, p. 38.) He was followed by his witness Vernia, who described himself as Mr. Adamson's "traveling agent," who, in his cross-examination, was confronted by Mr. Mellow while on the stand and was forced to admit that he had lied to him for the purpose of furthering Mr. Adamson's interests in this suit. The character of this assistant of Mr. Adamson, and the nature of the services ren-

dered by him in his lawsuits, is indicated by the following from his cross-examination:

"Q. What did you say was your business? A. I probably told him—

Q. No, what did you tell him? A. I told him I was connected with Dike.

Q. What else did you tell him? A. That is all that I can remember.

Q. Are you connected with Dike? A. No, sir.

Q. What reason had you for telling him a lie? A. Telling him what, I beg your pardon?

Q. What reason had you for telling him that lie? A. I wished to gain some information which I had found was hard to gain if these people who manufactured infringements knew who I was and who I represented.

Q. You felt a liberty to lie to him in order to get certain information, did you? A. Under the circumstances, he being an infringer, I took that liberty." (Transcript, pp. 40-41.)

It is respectfully submitted that upon the facts presented by this record, the respondent having made a complete case of anticipation of the patented device, is entitled to have the ruling of the United States Circuit Court of Appeals for the Eighth Circuit sustained.

JAMES A. CARR,  
T. PERCY CARR,  
Solicitors for Respondent.